



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

2627

40104

B-178715

October 24, 1973

The Honorable Rogers C. E. Morton
The Secretary of the Interior

Dear Mr. Secretary:

We refer to the letter of May 21, 1973, reference WBR 520/953.2, from Mr. Richard R. Hite, Deputy Assistant Secretary, concerning the claim of Mr. Thomas R. Holland, an employee of the Bureau of Reclamation stationed at Ellis, Kansas. Mr. Holland, a reservoir superintendent, is claiming 2 hours overtime for Sundays and holidays that he was required to work during the period August 1, 1955, through January 10, 1970.

It is stated that throughout northern Kansas, eastern Colorado, and southern Nebraska the Bureau of Reclamation operates 10 dams and reservoirs for the purpose of delivering water to various irrigation districts and municipalities. A reservoir superintendent is appointed to each of these reservoirs in order to control water deliveries. The reservoir superintendent is required to live in Government-furnished housing at each reservoir and is the only full-time onsite Bureau employee at the location.

Until January 25, 1970, each reservoir superintendent was required to take weather and reservoir operation records on a daily basis, including Sundays and holidays. Each employee had a regular 40-hour tour of duty spread over 6 days--7 hours per day Monday through Friday and 5 hours on Saturday. The additional work that was required on the non-workdays, Sundays and holidays, took approximately 30 minutes per day and in order to compensate the superintendents for this work, each was instructed to take compensatory time off by adjusting his quitting time on one of the normal workdays in accordance with the amount of time he had worked on the Sunday or holiday. This compensatory time arrangement was made official in a letter dated October 29, 1957, from the Chief of Irrigation Operations. That letter provided in part as follows:

"I realize that the obtaining of these daily records on weekends and holidays entails some work on the part of the Superintendents which is considered part of the overall work time for the week. However, I expect that Superintendents are making adjustments for this extra time by adjusting their quitting time for normal work days at some hour before five o'clock which will offset the actual time worked on holidays and weekends."

BEST DOCUMENT AVAILABLE

[Claim for Overtime Compensation]

PUBLISHED DECISION
53 Comp. Gen.....

718414 / 091777

This arrangement continued in effect until January 25, 1970, at which time work schedules for superintendents at most of the dams were revised to provide for 40-hour, Monday through Friday, workweeks during the winter months. At the same time it was determined that regular readings of gauges on Saturdays and Sundays would only have to be made when the last day of the month fell on one of those days. Superintendents were to be given compensatory time for all such readings made on Saturdays and a minimum of 2 hours overtime for readings taken on Sundays.

Mr. Hite states that it was felt reasonably certain that prior to the change in 1970 reservoir superintendents were adjusting their work hours in accordance with the compensatory time requirement. However, Mr. Holland and at least one other superintendent claim they did not do so. Mr. Holland is now claiming 2 hours overtime for each of the Sundays and holidays from August 1, 1955, through January 10, 1970, that he was required to take weather and reservoir operation records.

It is the position of the Bureau of Reclamation that Mr. Holland's claim was untimely filed since he apparently accepted the compensatory time arrangement for a period of nearly 15 years without ever bringing his discontent with the arrangement to the attention of management. It is further noted that Mr. Holland did not file a claim for overtime until May 1, 1972, a period of over 2 years after the arrangement was discontinued. Mr. Holland, however, states that he requested overtime pay on a number of occasions but that his requests were turned down. It is further contended that if Mr. Holland did fail to take the compensatory time off as provided for under the arrangement, the time must be considered forfeited under the provisions of section 550.114(c) of title 5, Code of Federal Regulations (CFR).

In light of the foregoing, the following specific questions are presented by Mr. Hite:

- "1. Is management's viewpoint that the claim was filed untimely valid? Is the position that compensatory time was forfeited under the provisions of Civil Service Regulation 550.114(c) valid?
- "2. Is Mr. Holland, in fact, entitled to callout compensation in view of the fact that the compensatory time off arrangement was unilaterally imposed by management, rather than being requested by the employee?"

B-178715

In the event our answer to question No. 2 is in the affirmative, certain additional questions are raised concerning the amount to which Mr. Holland is entitled.

In advising Mr. Holland that his claim is regarded as having been untimely filed, the Bureau of Reclamation, in its letter of September 29, 1972, relies on section 550.803(b) of title 5, Code of Federal Regulations. That section contains procedures under 5 U.S.C. 5596 governing the payment of backpay in instances where, on the basis of an administrative determination or timely appeal, an employee is found to have undergone an unjustified or unwarranted personnel action. A claim for overtime compensation such as Mr. Holland's is not within the purview of 5 U.S.C. 5596 and thus the requirement thereunder of timely appeal is not applicable. Pertinent to the timeliness of claims against the Government, 31 U.S.C. 71a, 237, provides only that claims shall be received in the General Accounting Office within 10 years of the date such claim first accrued. Since Mr. Holland's claim was received in this Office on May 23, 1973, only that portion prior to May 23, 1963, is barred.

The basic statutory provisions regarding the payment of overtime are codified in section 5542 of title 5, United States Code. That section provides, in part, as follows:

"§5542. Overtime rates; computation.

"(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

"(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

"(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to

one and one-half times the hourly rate of the minimum rate of basic pay for GS-10, and all that amount is premium pay.

* * * * *

"(b) For the purpose of this subchapter—

"(1) unscheduled overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is deemed at least 2 hours in duration * * *."

Section 5543 of title 5 provides for granting an employee compensatory time off from his scheduled tour of duty in lieu of payment of overtime under certain circumstances. The implementing regulations to that statute are found in 5 CFR 550.114. That section provides as follows:

§550.114 Compensatory time off for irregular or occasional overtime work.

"(a) At the request of an employee, the head of a department may grant him compensatory time off from his tour of duty instead of payment under §550.113 for an equal amount of irregular or occasional overtime work.

"(b) The head of a department may provide that an employee whose rate of basic pay exceeds the maximum rate for GS-10 shall be paid for irregular or occasional overtime work with an equivalent amount of compensatory time off from his tour of duty instead of payment under §550.113.

"(c) The head of a department may fix a time limit for an employee to request or take compensatory time off and may provide that an employee who fails to take compensatory time off to which he is entitled under paragraph (a) or (b) of this section before the time limit fixed, shall lose his right both to compensatory time off and to overtime pay unless his failure is due to an exigency of the service beyond his control."

B-178715

Under those regulations, a department head may require that an employee, whose rate of basic pay exceeds the maximum rate for GS-10, take compensatory time off for irregular or occasional overtime work instead of being paid overtime compensation for that work under 5 U.S.C. 5542. Employees whose rate of basic pay, like Mr. Holland's, is less than the maximum rate for GS-10 may, at their request, be granted compensatory time off in lieu of overtime compensation for irregular or occasional overtime work.

It does not appear that the overtime work required of Mr. Holland was either irregular or occasional. Prior to January 1970 Mr. Holland was required to take certain readings of gauges on a daily basis, including Sundays and holidays. The work he performed on Sundays was in addition to his regular 40-hour tour of duty. The concept of regular as opposed to irregular overtime appears in various statutes governing the compensation of Federal employees. Under 5 U.S.C. 5545(c)(2) which authorizes payment of premium compensation for "irregular, unscheduled overtime duty," we have held that the term "regular overtime" is work which occurs on successive days or after specified intervals, as opposed to irregular overtime which does not recur in that manner. 48 Comp. Gen. 334 (1965), 52 Comp. Gen. 319 (1972). We find nothing to warrant a different construction of the word "irregular" in the context of 5 U.S.C. 5543, nor does the legislative history of that section indicate that Congress intended the word "occasional" as used therein to have a meaning other than the common dictionary definition, namely "occurring now and then; occurring at irregular intervals; infrequent." Webster's New International Dictionary, 2d Edition, 1959. We do not believe that work required to be performed every Sunday on a regular and recurring basis can be considered either "irregular" or "occasional." Accordingly it does not appear that the overtime work performed by Mr. Holland on Sundays up to January 1970 would come within the purview of the provisions of 5 U.S.C. 5543 and 5 CFR 550.114 and thus he cannot be viewed as having forfeited his right to compensation for the time he worked under the provisions of 5 CFR 550.114(c). With the exception of that portion of his claim prior to May 23, 1963, it appears that Mr. Holland is entitled to overtime compensation for his work on Sundays under the provisions of 5 U.S.C. 5542(a) as work officially ordered or approved in excess of 40 hours in an administrative workweek.

As to the amount of his entitlement, Mr. Holland should be paid at the rate provided under 5 U.S.C. 5542(a)(1) only for the actual time he worked on Sundays. In that regard we point out that 5 U.S.C. 5542(b)(1) provides for the payment of a minimum of 2 hours overtime only for

B-178715

"unscheduled overtime work performed by an employee on a day when work was not scheduled for him." As previously discussed, the work performed by Mr. Holland was regularly scheduled to recur on successive Sundays. Therefore overtime payments would only be appropriate for time spent by Mr. Holland in actual work on a Sunday. Any work performed on a holiday, however, would be for compensation at the appropriate rate for a minimum of 2 hours in accordance with the provisions of 5 U.S.C. 5546(c). Since it is indicated that the days worked by Mr. Holland since May 23, 1963, can be verified by time and attendance records, he should be paid in accordance with the foregoing based on those records.

We note that Mr. Holland is also claiming interest on the amount due him. Concerning that portion of his claim, it is well settled that the payment of interest by the Government on its unpaid accounts or claims may not be made except where interest is stipulated for in legal and proper contracts, or when allowance of interest is specifically directed by statute. There is no statute authorizing interest on claims similar to that here involved.

As to the work schedule currently in effect as shown by the letter of January 13, 1970, from the Project Manager, Kansas River Projects, it is indicated that reservoir superintendents are being required to take compensatory time off for the work they are required to perform in excess of 40 hours per week when the last day of the month falls on a Saturday during the winter months. Under the provisions of 5 U.S.C. 5543 it would appear that, for those employees whose rate of pay does not exceed the maximum rate for GS-10, overtime pay would be proper unless compensatory time off is specifically requested by the employee.

We are aware that our decision herein with respect to the claim of Mr. Holland will serve as a basis for adjudicating similar claims for some, or all, of the other reservoir superintendents concerned. In that regard, those employees who, like Mr. Holland did not adjust their work hours in accordance with the compensatory time arrangement would be entitled to overtime compensation on the same basis as Mr. Holland. As to those employees who took compensatory time, they would be entitled to the difference between the amount of overtime compensation they should have received and the value of the compensatory time used. In computing such amounts due we point out that prior to enactment of section 1(24) of Public Law 90-83, September 11, 1967, 81 Stat. 200, the controlling rate of pay with respect to payment of overtime compensation under 5 U.S.C. 5542 was the minimum rate for grade GS-9 rather than the minimum rate for grade GS-10 currently in effect.

B-178715

Upon receipt of claims from the other superintendents, those which may be affected by the 10-year limitation should be forwarded to our Transportation and Claims Division (General Claims) for recording under 4 GAO Manual 7.1. After recording, such claims will be returned for your consideration.

Sincerely yours,

R.F.KELLER

Deputy

Comptroller General
of the United States